

IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF TEXAS  
SHERMAN DIVISION

**FILED**

APR 10 2018

Clerk, U.S. District Court  
Texas Eastern

JASON LEE VAN DYKE,  
*Plaintiff,*

v.

CASE NO. 4:18cv247

THOMAS RETZLAFF,  
*Defendant.*

**RETZLAFF'S MEMORANDUM IN SUPPORT OF MOTION TO  
DISMISS AND FOR SANCTIONS PURSUANT TO THE TEXAS  
CITIZENS PARTICIPATION ACT**

Defendant, Tom Retzlaff, asks the Court to dismiss plaintiff's petition  
and request for injunction under the Texas Citizens Participation Act  
(codified in Texas Civil Practice & Remedies Code chapter 27).

**A. Introduction**

1. Plaintiff is Jason Lee Van Dyke; defendant is Tom Retzlaff.
2. In his original petition, Van Dyke sued Retzlaff for libel per se,  
intrusion on seclusion, tortious interference with contract – Victoria County,  
tortious interference with contract – KLR, and intentional infliction of

emotional distress. Van Dyke further requests injunctive relief in the form of both a temporary restraining order and a permanent injunction.

### **B. Background**

3. Van Dyke is an attorney licensed by the States of Texas, Georgia, Colorado, and the District of Columbia, who has made numerous appearances in the public media pontificating on such topics as revenge pornography, race relations, and governance. Van Dyke is also a former employee and felony prosecutor for the Victoria County District Attorney's office. See petition at ¶4.10. As such, Van Dyke is a public figure who has, or appears to the public to have, a significant role in the business of government and public affairs.

4. Retzlaff attaches affidavits to this motion to establish facts not apparent from the record and incorporates them by reference.

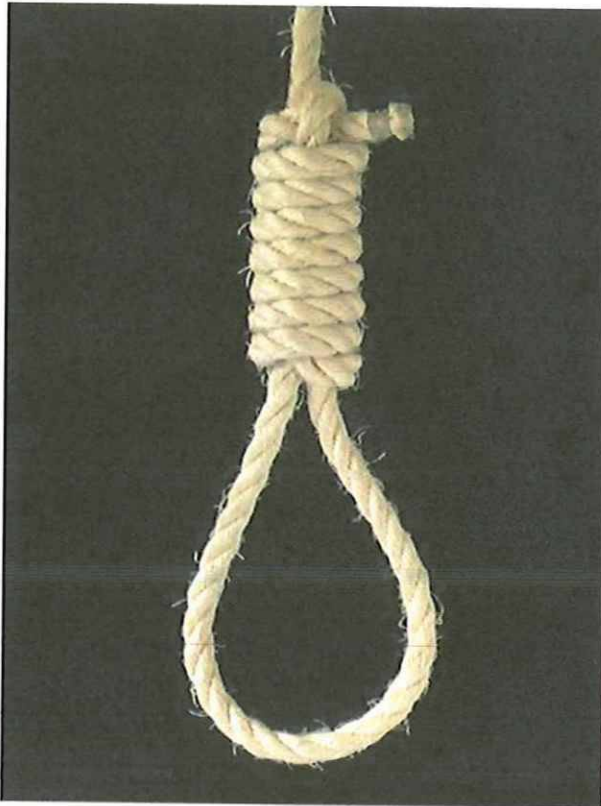
5. Van Dyke is also openly racist, as evidenced by this recent Twitter post.



Jason L. Van Dyke  
@MeanTXLawyer

 Follow

@dividedly\_ Look good and hard at this picture you fucking nigger. It's where I am going to put your neck.

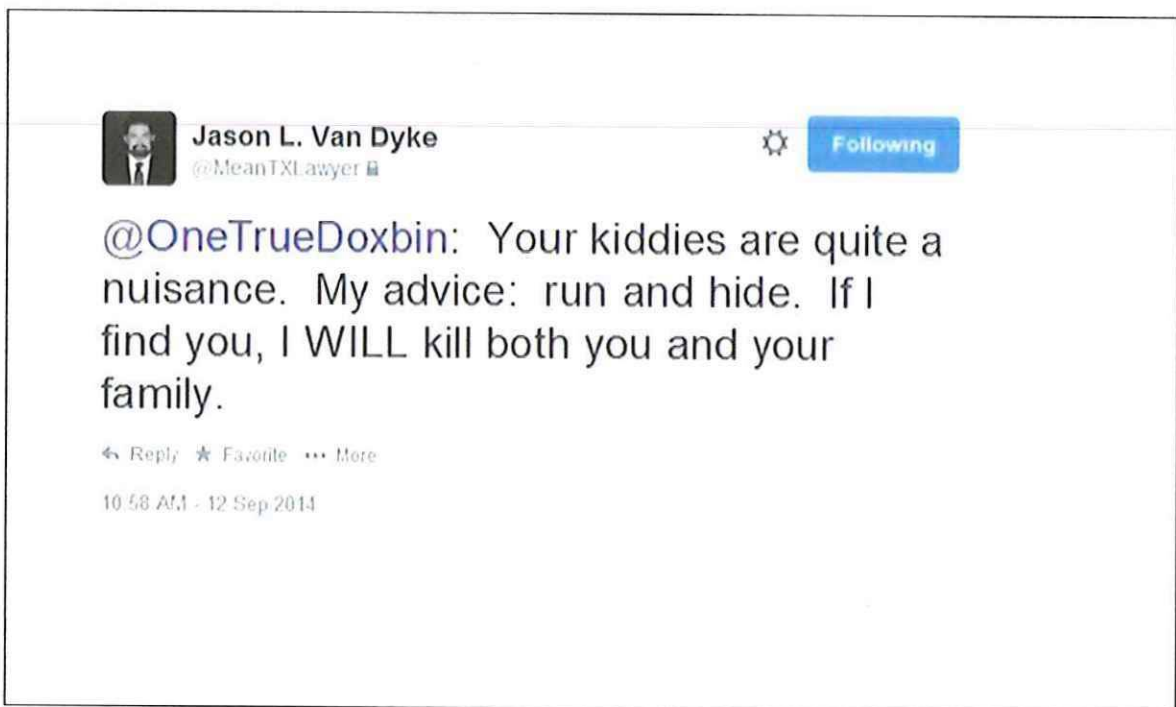


RETWEETS  
2

FAVORITES  
3



And he is extremely violent and threatening.





### C. Argument & Authorities

6. When an individual attempts to manipulate the legal system to intimidate and silence others who have used the system to vindicate their rights, the act threatens a core value of democracy – the right to petition the government to address a grievance. Laura Lee Prather and Justice Jane Bland, *Bullies Beware: Safeguarding Constitutional Rights Through Anti-SLAPP in Texas*, 47 Tex. Tech L. Rev. 725, 727 (2015).

7. In the case at hand, this is exactly what Van Dyke is doing here when he openly admits in his petition that this **\$100 million lawsuit** is the direct result of Retzlaff's alleged petitioning the government in the form of a grievance filed with the State Bar of Texas (see petition at ¶3.3, 3.4), and his further alleged petitioning the government with regards to the qualifications (or complete lack thereof) for the public office of Chief Felony Prosecutor in the Victoria County, Texas, District Attorney's Office (see petition at ¶4.10 – 4.13), or Retzlaff's alleged communications to others relating to legal services offered by an attorney in the marketplace (see petition at ¶4.15)!

8. The Texas Legislature enacted the Texas Citizens Participation Act (TCPA) to encourage and safeguard the constitutional rights of a defendant to speak freely, petition, associate freely, and otherwise participate in

government to the maximum extent provided by law. Tex. Civ. Prac. & Rem. Code §27.002. See also *In re Lipsky*, 460 S.W.3d 579, 586 (Tex. 2015) (explaining that the TCPA “protects citizens from retaliatory lawsuits”).

9. To safeguard these constitutional rights expeditiously and by cost-effective means, the TCPA gives defendants the power to resolve at an early stage whether a legal action impinging on such rights has merit by filing a motion to dismiss (commonly referred to as an “anti-SLAPP motion” or a motion to dismiss a “Strategic Lawsuit Against Public Participation”). See Tex. Civ. Prac. & Rem. Code §27.003(a), (b). **Once the motion is filed, all discovery is stayed in the legal action until the court rules on the motion,** which must occur within 60 days after the motion is served. *See id.*

§§27.003(c), 27.004, 27.005. If the defendant is successful in dismissing the legal action, the defendant is entitled to court costs, attorney fees, and other expenses incurred in defending against the action as justice and equity may require. *Id.* §27.009(a)(1). The court must also impose sanctions sufficient to deter the plaintiff from bringing a similar action in the future. *Id.* §§27.007(a), 27.009(a)(2).

10. A strategic lawsuit against public participation (SLAPP) is a lawsuit that is intended to censor, intimidate, and silence critics by burdening them with the cost of a legal defense until they abandon their criticism or opposition. The typical SLAPP plaintiff does not normally expect to win the lawsuit. The plaintiff's goals are accomplished if the defendant succumbs to fear, intimidation, mounting legal costs, or simple exhaustion and abandons the criticism. A SLAPP may also intimidate others from participating in the debate. A SLAPP is often preceded by a legal threat.

11. To succeed on a motion to dismiss under the TCPA, the defendant must show by a preponderance of the evidence that the plaintiff's legal action is based on, related to, or in response to the defendant's exercise of (1) the right of free speech, (2) the right to petition, or (3) the right of association. Tex. Civ. Prac. & Rem. Code §27.005(b); *Hersh v. Tatum*, 526 S.W.3d 462 (Tex. 2017); *ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895 (Tex. 2017); *In re Lipsky*, 460 S.W.3d 579, 586 (Tex. 2015). If the defendant meets its burden, the court must dismiss the plaintiff's action unless the plaintiff can either (1) establish that the challenged claim is exempt from the TCPA, or (2) establish by clear and specific evidence a prima facie case for each essential element of the challenged claim. See Tex. Civ. Prac. & Rem. Code §§27.005(c), 27.010; *D Magazine Partners*,



*L.P. v. Rosenthal*, 529 S.W.3d 429 (Tex. 2017); *In re Lipsky*, 460 S.W.3d at 587. In evaluating a motion to dismiss, the court must construe the TCPA liberally to fully effectuate its purpose and intent to encourage and safeguard a defendant's constitutional rights. See Tex. Civ. Prac. & Rem. Code §§27.002, 27.011.

**I. Van Dyke's Legal Action Impinges On Retzlaff's Constitutional Rights Under The TCPA.**

12. Van Dyke's petition should be dismissed because it is based on, related to, or in response to Retzlaff's exercise of his right of free speech. Under the TCPA, a defendant exercises his right of free speech when he makes a communication in connection with a matter of public concern. Tex. Civ. Prac. & Rem. Code §27.001(3); *Hersh*, 526 S.W.3d at 466; *ExxonMobil*, 512 S.W.3d at 898; *Lippincott v. Whisenhunt*, 462 S.W.3d 507, 509 (Tex. 2015); see *Better Bus. Bur. of Metro. Hous., Inc. v. John Moore Servs., Inc.*, 441 S.W.3d 345, 353-54 (Tex. App.—Houston [1st Dist.] 2013, pet. denied). A communication includes the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic, regardless of whether the communication is made or submitted publicly or privately. *ExxonMobil*, 512 S.W.3d at 898;



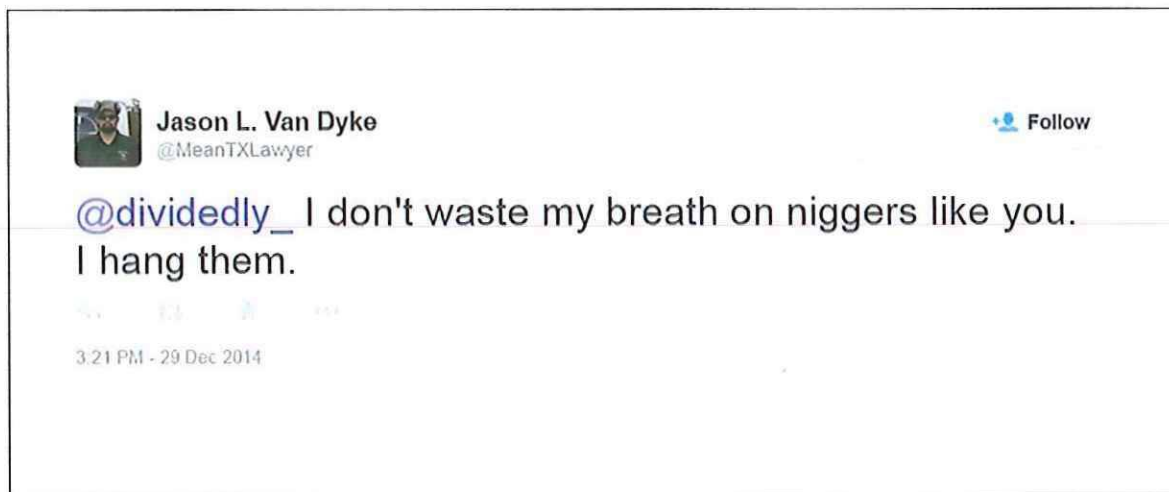
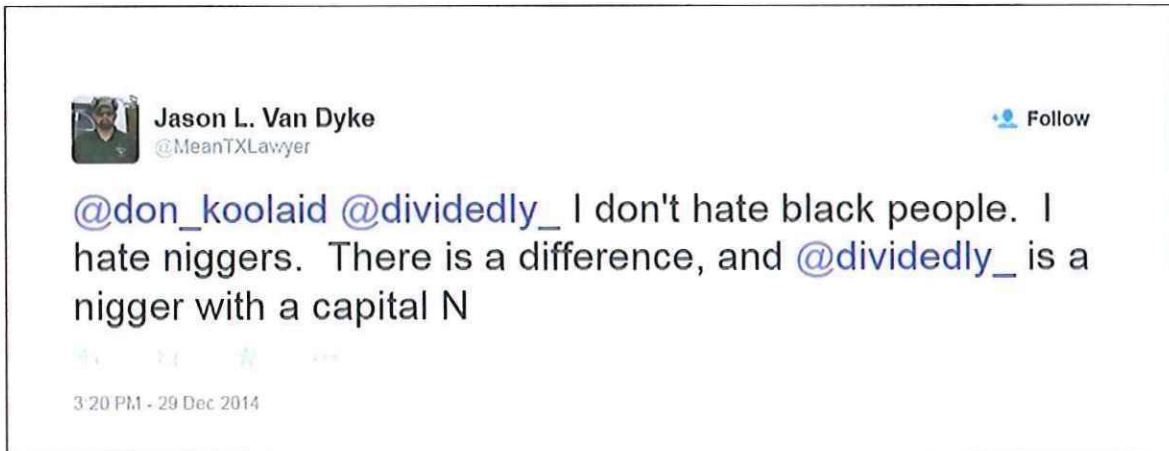
*Lippincott*, 462 S.W.3d at 509; see Tex. Civ. Prac. & Rem. Code §27.001(1). A matter of public concern includes an issue related to (1) health or safety, (2) environmental, economic, or community well-being, (3) the government, (4) a public official or public figure, or (5) a good, product, or service in the marketplace. Tex. Civ. Prac. & Rem. Code §27.001(7); *ExxonMobil*, 512 S.W.3d at 899; see also *Deaver v. Desai*, 483 S.W.3d 668, 673 (Tex. App. – Houston [14th Dist.] 2015, no pet.) (holding statements relating to legal services offered by attorney in the marketplace addressed matters of public concern).

13. In his petition, Van Dyke alleged the following in support of his claim for libel *per se* against Retzlaff:

- a) That Retzlaff supposedly runs a blog called the *ViaView Files* ([www.ViaViewFiles.net](http://www.ViaViewFiles.net)) in which Van Dyke was allegedly called a “Nazi”, a “white supremacist”, that “has a criminal record for abusing women”, and who “committed professional misconduct against Retzlaff.”
- b) That Retzlaff then supposedly contacted Van Dyke’s employers, Robert Karlseng and Claude Rich (via email under using the pseudonym *Dean Anderson*) complaining about them employing Van Dyke and (presumably) threatening to expose Van Dyke’s racist and threatening social media statements.

14. Van Dyke claims that these alleged communications caused injury to his “office, profession, and occupation”, which is an interesting claim to

make in light of Van Dyke's own social media statements going back many years:



15. In his petition, Van Dyke alleged the following in support of his claim for tortious interference with contact – Victoria County against Retzlaff:

- a) That Retzlaff supposedly told a 3<sup>rd</sup> Party (the State Bar of Texas) that he (Retzlaff) had contacted the Victoria County District Attorney and

said, “Do not hire this guy – he is a fucking lunatic!” and then allegedly directed the District Attorney to examine social media posts and news articles about Van Dyke. (See petition at ¶3.3.)

- b) Van Dyke further claims that Retzlaff had knowledge of an alleged “existing contract” for employment with the Victoria County District Attorney. (Petition at ¶4.10.)<sup>1</sup>

16. In his petition, Van Dyke alleged the following in support of his claim for tortious interference with contact – KLR against Retzlaff:

- a) That Retzlaff had knowledge of an existing contract between Van Dyke and a title company called Karlseng, LeBlanc & Rich, LLC (“KLR”);
- b) And that Retzlaff contacted two of Van Dyke’s supervisors using a pseudonymous email account, *Dean Anderson*, basically threatening to expose them on social media for employing Van Dyke in light of Van Dyke’s ties to white supremacists, posting hate speech and death threats on social media, and news articles labeling Van Dyke as a “Nazi.” (Petition at ¶4.14, 4.15.)

17. In construing the TCPA liberally, these allegations (if true) clearly fall within the scope of the TCPA because they are based on, related to, or in response to a communication made by Retzlaff on a matter of public concern. Van Dyke’s fitness and qualifications for the job of felony prosecutor, in light of his open and violently racist statements, is clearly a

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<sup>1</sup> It should be noted that this is the second lawsuit that Van Dyke has filed regarding him not being hired by the District Attorney’s Office. In March 24, 2017, Van Dyke filed a lawsuit against the Victoria County District Attorney, Case # 17-03-80810-D, *Jason Lee Van Dyke v. Stephen B. Taylor*, in the 377<sup>th</sup> District Court seeking pre-suit discovery and depositions pursuant to Tex.R.Civ.P. 202. On June 16, 2017, Van Dyke’s Rule 202 petition was denied. No appeal was filed.



matter of public concern. The same is true regarding Van Dyke's claims that Retzlaff made statements to KLM relating to legal services offered by attorney Van Dyke in the marketplace.

18. In paragraph 4.5 of the petition, Van Dyke further claims being accused of being "a Nazi and a white supremacist", and having "a criminal record for abusing women" (whatever that means), and "committing professional misconduct towards Retzlaff" (under the guise of Retzlaff's State Bar grievance), "falsely charges Van Dyke with the commission of a crime." This is simply not true as none of these claims are offenses for which a person can be criminally charged.

19. Van Dyke's petition should be dismissed because it is based on, related to, or in response to Retzlaff's exercise of his right to petition. Under the TCPA, a defendant exercises his right to petition when he makes

(1) a communication in or pertaining to a judicial proceeding or one of the other proceedings described in Texas Civil Practice & Remedies Code section 27.001(4)(A);

(2) a communication in connection with an issue under consideration or review by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding;

(3) a communication that is reasonably likely to encourage consideration or review of an issue by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding;



(4) a communication reasonably likely to enlist public participation in an effort to effect consideration of an issue by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding; or,

(5) any other communication that falls within the protection of the right to petition government under the U.S. Constitution or the Texas Constitution.

Tex. Civ. Prac. & Rem. Code §27.001(4).

20. A communication includes the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic, regardless of whether the communication is made or submitted publicly or privately. *ExxonMobil*, 512 S.W.3d at 898; *Lippincott v. Whisenhunt*, 462 S.W.3d 507, 509 (Tex. 2015); see Tex. Civ. Prac. & Rem. Code §27.001(1); *Johnson-Todd v. Morgan*, 480 S.W.3d 605, 609 (Tex. App.—Beaumont 2015, pet. denied).

21. In his petition, Van Dyke alleged the following in support of his claim for libel *per se* and tortious interference with contract – Victoria County against Retzlaff:

- a) That Retzlaff allegedly contacted the Victoria County District Attorney and supposedly said “Don’t hire this guy – he’s a fucking lunatic!”
- b) That Retzlaff then allegedly directed the District Attorney to review news articles and social media posts of Van Dyke in an effort to show

that he is not fit for employment as an Assistant District Attorney in charge of felony prosecutions.

22. In construing the TCPA liberally, these allegations clearly fall within the scope of the TCPA because they are based on, related to, or in response to a communication made by Retzlaff in exercising his right to petition.

Contacting a local elected official about the potential hiring of a public official, and filing a grievance with State Bar of Texas, are all examples of

a) communications in connection with an issue under consideration or review by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding; and,

b) communications that are reasonably likely to encourage consideration or review of an issue by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding.

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## **II. Retzlaff Denies Making Certain Statements**

23. Retzlaff's denies Van Dyke's allegations contained in paragraph 3.5 and 3.6 of the petition. Specifically, for over 4 ½ years, in one lawsuit or another, Retzlaff has always denied being an Administrator for this *BV Files* / *ViaView Files* blog and he has always denied being responsible for any of the *Dean Anderson* emails. See Retzlaff's affidavit at ¶3.

24. The Texas Supreme Court has held that, under the TCPA, a defendant moving for dismissal need show only that the plaintiff's "legal action is based on, relates to, or is in response to the [defendant's] exercise of . . . the right of free speech" – that is, "a communication made in connection with a matter of public concern" – not that the communication actually occurred. *Hersh*, 526 S.W.3d at 467. Thus, Retzlaff denials alone are enough to invoke the applicability of the TCPA.

### **III. Lack Of Personal Jurisdiction Shows That Van Dyke Cannot Prevail**

25. The pertinent question under the TCPA statute is simply whether the plaintiff has established a probability of prevailing on a claim alleged to justify a remedy. While lack of substantive merit is one reason a plaintiff might fail to make the requisite showing, lack of subject matter jurisdiction is another.

26. A plaintiff cannot prevail on his or her claim unless the court has the power to grant the remedy the plaintiff seeks. Thus, while a ruling on an anti-SLAPP motion may involve a determination of the merits of the plaintiff's claim, it may in other cases involve a determination that the



plaintiff's claim fails for another, non-merits based reason, such as lack of subject matter jurisdiction. A claim may fall into this category if it lacks substantive merit, but it may also fall into this category if it is filed in a tribunal that lacks the power to hear it.

27. The principle of "subject matter jurisdiction" relates to the inherent authority of the court involved to deal with the case or matter before it. In the absence of subject matter jurisdiction, a trial court has no power to hear or determine the case. Thus, while a ruling on an anti-SLAPP motion may involve a determination of the merits of the plaintiff's claim, it may in other cases involve a determination that the plaintiff's claim fails for another, non-merits-based reason, such as lack of subject matter jurisdiction. This conclusion accords with the basic purpose underlying the Texas Citizen's Participation Act: namely, to shield defendants from the undue burden of defending against claims filed not for the purpose of securing judicial redress, but to intimidate or harass on the basis of the defendant's constitutionally protected activity. A claim may fall into this category if it lacks substantive merit, but it may also fall into this category if it is filed in a tribunal that lacks the power to hear it.



28. For example, a claim which is meritless because it is barred by the statute of limitations will cause just as much intimidation as a claim which is barred because of a constitutional defense.

29. In the case at hand, Van Dyke has requested, among other things, injunctive relief. Retzlaff, who resides in Arizona, is absolutely untouchable when it comes to restraining orders or injunctions coming from the state of Texas. There are no legal mechanisms that allow for the enforcement of an out-of-state injunction.

30. Secondly, Van Dyke claims that “personal jurisdiction over the Defendant is appropriate in this court because Defendant has committed numerous tortious acts against a resident of this state.” (See petition at

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¶2.3.) Not too put too fine of a point on it, **But so what?**

31. In interpreting the United States Supreme Court instructions in *Walden v. Fiore*, 134 S. Ct. 1115 (2014), involving personal jurisdiction, the Texas Supreme Court has rejected a jurisdictional test “based solely upon the effects or consequences” in the forum state, such as that argued by Van Dyke in his petition, because the Texas Supreme Court has expressly

rejected the “directed-a-tort” test for specific jurisdiction in its holding in *Michiana Easy Livin’ Country, Inc. v. Holten*, 168 S.W.3d 777 (Tex. 2005).

32. This fundamental holding has been reaffirmed by the Texas Supreme Court in *TV Azteca v. Ruiz*, 490 S.W.3d 29 (Tex. 2016). Specifically, three principles guide the analysis of whether a nonresident has purposefully availed itself of the privilege of conducting activities in Texas:

*First, only the defendant’s contacts with the forum are relevant, not the unilateral activity of another party or a third person. Second, the contacts relied upon must be purposeful rather than random, fortuitous, or attenuated. . . . Finally, the defendant must seek some benefit, advantage[,] or profit by availing itself of the jurisdiction.*

*TV Azteca*, 490 S.W.3d at 38.

33. No one disputes that Van Dyke resides in Texas and the brunt of any injuries he suffered from Retzlaff’s alleged actions occurred in Texas.

**Sucks to be him.** But as the Texas Supreme Court explained in

*Michiana*, courts cannot base specific jurisdiction merely on the fact that the defendant “knows that the brunt of the injury will be felt by a particular resident in the forum state.” *Michiana*, 168 S.W.3d at 788. “Put simply, however significant the plaintiff’s contacts with the forum may be, those contacts cannot be ‘decisive in determining whether the defendant’s due

process rights are violated.’” *Walden*, 134 S. Ct. at 1122 (quoting *Rush v. Savchuk*, 444 U.S. 320, 332, 100 S. Ct. 571, 62 L. Ed. 2d 516 (1980)).

#### **IV. No Damages Are Available For Van Dyke’s Emotional Distress Claim**

34. The Texas Supreme Court has held that intentional infliction of emotional distress is intended as a gap-filler tort which has no application when the conduct at issue invades some other legally-protected interest. See *Oliphint v. Richards*, 167 S.W.3d 513, 517 (Tex. App. 2005) (“Because [plaintiff] did not even attempt to base his intentional infliction of emotional distress claim on facts independent of his defamation claim, we hold that an intentional infliction of emotional distress claim is not available.”) (citing *Hoffmann—La Roche Inc. v. Zeltwanger*, 144 S.W.3d 438, 447 (Tex.2004)). Thus, “[w]here the gravamen of a plaintiff’s complaint is really another tort, intentional infliction of emotional distress should not be available.” *Id.* Accordingly, and because Van Dyke’s intentional infliction of emotional distress claim is not based on facts independent of his defamation claim, damages are not available under such a claim. See *Gjergjani v. Ware*, 2016 U.S. Dist. LEXIS 116461 \*18-19, 2016 WL 4545521 (E.D. Tex. August 8, 2016).

### **D. Conclusion**

35. Because Van Dyke's legal action relates solely to Retzlaff exercising his right to petition both the State Bar of Texas and the District Attorney of Victoria County, Retzlaff has established that he enjoys absolute immunity under the judicial communication privilege. Thus, Van Dyke's lawsuit must be dismissed and Retzlaff must be awarded his attorney's fees and mandatory sanctions.

### **E. Prayer**

36. For these reasons, and in the interests of justice and fairness, Retzlaff asks the Court to dismiss, with prejudice, Van Dyke's lawsuit and award Retzlaff attorney's fees and mandatory sanctions, as provided by the TCPA.



Respectfully submitted,

A handwritten signature in black ink that appears to read "Tom". The signature is stylized with a cursive 'T' and a simple 'om'.

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Thomas Retzlaff  
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(210) 317-9800  
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DEFENDANT, PRO SE

**CERTIFICATE OF SERVICE**

I certify that on April 9, 2018, a copy of this document was served upon plaintiff via 1<sup>st</sup> class US Mail at his residence of:

**Jason L. Van Dyke, 108 Durango Dr., Aubrey, TX 76227**

A handwritten signature in black ink, appearing to read "Tom", is positioned above a horizontal line.

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Thomas Retzlaff

IN THE UNITED STATES DISTRICT COURT FOR THE  
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SHERMAN DIVISION

JASON LEE VAN DYKE,  
*Plaintiff,*

v.

CASE NO. \_\_\_\_\_

THOMAS RETZLAFF,  
*Defendant.*

**AFFIDAVIT OF TOM RETZLAFF**

On this day, Tom Retzlaff appeared before me, a Notary Public, and after I administered an oath to him, upon his oath, he said:

1. "My name is Tom Retzlaff. I am more than 18 years of age and capable of making this affidavit. I have personal knowledge of the facts and matters set forth herein, which are true and correct.

2. I the defendant in this lawsuit.

3. I have always denied being an Administrator for this *BV Files / ViaView Files* blog and I have always denied being responsible for any of the Dean Anderson emails".

FURTHER AFFIANT SAYETH NOT.

*Tom*

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**TOM RETZLAFF**

SWORN TO and SUBSCRIBED before me by Tom Retzlaff, personally known to me or identified to be the same, on April 5, 2018.

*Denise Hollas*

Notary Public in and for the State of Arizona

